No. 121.

Brf. of ~~Krauthoff~~ Stew

SUPREME COURT OF THE UNITED S

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OCTOBER TERM, 1901.

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FREDERICK HOWARD *et al.*,
Plaintiffs in Error,
vs.
THE UNITED STATES *to the use of*
DAVID D. STEWART.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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This is a writ of error directed to a circuit court of appeals, and at the threshold the Court (as has been said before) is confronted with the ever-recurring question of jurisdiction.

A petition was filed in the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein the United States of America, "at the relation and to the use of David D. Stewart" (Rec., p. 4), a citizen of the State of Maine (3), prayed judgment against Howard, Gage, Lombard and McDonald, "citizens and residents of the State of Missouri," and inhabitants of the district in which they were sued (3) for an amount in excess of two thousand dollars, exclusive of interest and costs (4).

The action being to the use of Stewart, he is regarded as the real party in interest, and his citizenship is diverse from that of the defendants, and the requisite amount in controversy is involved, and the jurisdiction of the Circuit

Court in the first instance is maintainable on the ground of diverse citizenship.

Browne *v.* Strode (1809) 5 Cranch, 303;
McNutt *v.* Bland (1844) 2 How. 9;
Maryland *v.* Baldwin (1884) 112 U. S. 490.

"The circuit courts of the United States have original cognizance, concurrently, with the courts of the several States, of all *suits of a civil nature*, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under* the Constitution or *laws of the United States*, or treaties made under their authority."

1 Foster's Fed. Prac. (2 Ed.) Sec. 15;
24 Stat. at Large, ch. 373, p. 552.

By the sixth section of the Act of March 3, 1891, creating the circuit courts of appeals, "the judgments * * * of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States."

26 Stat. 826, ch. 517.

"The jurisdiction referred to is the jurisdiction of the Circuit Court, and * * * the jurisdiction of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship."

American Sugar Ref. Co. *v.* New Orleans (1901) 181 U. S. 277, 280.

It is further provided that "in all cases not hereinbefore, in this section (Section six), made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs."

Northern Pacific Railroad *v.* Amato (1892) 144 U. S. 465, 471, 472.

The primary object of this act was "to facilitate the prompt disposition of cases in the Supreme Court, and to

relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations."

McLish *v.* Roff (1891) 141 U. S. 661, 666;
In re Woods (1892) 143 U. S. 202, 203;
Lau Ow Bew *v.* United States (1892) 144 U. S. 47, 55.

So the decisive test of the jurisdiction of the Supreme Court to review a judgment of a circuit court of appeals on a writ of error issued as a matter of right, as distinguished from a certiorari issued by the Supreme Court or a certified question issued by a circuit court of appeals, is thus determined:

(*a*) Does the suit arise under the Constitution or laws of the United States; or,

(*b*) Does the jurisdiction of the Circuit Court in the first instance attach solely by reason of diverse citizenship?

Under the first alternative of this proposition, the Supreme Court has jurisdiction; under the second alternative, the jurisdiction of the Supreme Court does not exist, and the writ of error should be dismissed.

There is no dispute in this case about the Constitution of the United States, so we are remitted to a consideration of the term, "*laws of the United States.*"

"Cases arising under the laws of the United States are such as grow out of the *legislation* of Congress."

Ellis *v.* Norton (1883) 16 Fed. Rep. 4, 5 (Pardee and McCormick, JJ.)

In Blackburn *v.* Portland Gold Mining Co. (1900) 175 U. S. 571, and Shoshone *v.* Rutter Mining Co. (1900) 177 U. S. 505, the term "laws of the United States" was assumed to mean an "act of Congress."

In re Barry (1844) 42 Fed. 113, 120 (affirmed *sub nom.* Barry *v.* Mercien (1846) 5 How. 103, cited with approval, *In re* Burrus (1890) 136 U. S. 586, 597), the words "laws of the United States" were considered as meaning an act of Congress. "The jurisdiction of the United States courts depends exclusively on the Constitution and *laws of the United States*, and they can neither in criminal nor civil cases re-

sort to the *common law* as a source of jurisdiction." (42 Fed. 113, 120.) The right to the possession of a child not depending "upon any act of Congress," the matter was held not to arise under the laws of the United States. (136 U. S. 594.)

Hence it follows, before the jurisdiction of the Circuit Court could attach in the first instance independent of diverse citizenship, it must appear the suit arises under an act of Congress. So that the plaintiffs in error invoke the jurisdiction of this court on the ground, the suit arises under an act of Congress, and then seek to defeat a recovery on the bond sued on, by a contention that the suit does not arise under an act of Congress because there is no act of Congress under which a cause of action arises or a suit can be maintained in favor of Stewart.

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2,000 and the defendant be properly served within the district."

Illinois Central Railroad Co. *v.* Adams (1901) 180 U. S. 28, 34.

Stewart, a citizen of Maine, can prosecute any cause of action whatever for an amount exceeding two thousand dollars against plaintiffs in error, citizens of Missouri, in a circuit court of the United States for the proper district. His right to recover goes to the merits and is not a jurisdictional question. Thus in Murray *v.* Chicago, etc., Ry. Co. (1894) 62 Fed. 24, the *jurisdiction* of the Circuit Court attached by reason of a removal from the State court (62 Fed. 42). The right to recover was maintained on common-law principles. Affirmed (1899) 92 Fed. 868.

It is true that Stewart alleged that Warren Watson had been appointed clerk of a circuit court of the United States (Rec., p. 3), but this allegation of itself does not present a suit arising under the laws of the United States.

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses."

Shoshone Mining Co. *v.* Rutter (1900) 177 U. S. 505, 507.

"The mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts." (*Ib.*, 513.)

"The writ of error in this case was brought under Section six of the judiciary Act of March 3, 1891. If the judgment of the Circuit Court of Appeals was final, under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different States. * * * This question must be answered upon an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of that court because the parties were citizens of different States, or because the case was alleged to be one arising under the Constitution, laws, or treaties of the United States."

Florida, etc., Railroad Co. *v.* Bell (1900) 176 U. S. 321, 325.

In Blackburn *v.* Portland Gold Mining Co. (1900) 175 U. S. 571, it was held a controversy between rival mining claimants which was claimed to arise under two sections of the Revised Statutes of the United States did not so in fact arise, and that it was not a cause of which a circuit court of the United States could take original jurisdiction unless the requisite diversity of citizenship and amount involved existed.

In Trafton *v.* Nougues (1877) 4 Sawy. 178; Fed. Cas. 14134, Judge Sawyer said: "Where a suit presents no disputed construction of an act of Congress; where there is no contest at all as to what the act means, or what rights it gives; where the only questions are as to what are the local mining laws, rules and customs, and as to whether the parties have in fact performed the acts required by such local

laws, rules and customs, how can it be said, in any just sense, that such a suit 'really and substantially involves a dispute or controversy' arising under an act of Congress."

In the case at bar, Judge Adams said on the Circuit: "The *defences* are two: First, that the relator (Stewart) is not authorized to sue on the bond in question because the United States of America is the sole obligee, *and no statute* of the United States authorizes a suit thereon at the relation and to the use of an individual; second, that the clerk did not take possession of the money tendered by virtue of his office as clerk." (Rec., p. 23.)

These are the only defences insisted on by plaintiffs in error in this court. (See Brief for Plaintiffs in Error.)

In the Blackburn case the Court repeated what Chief Justice Marshall and Chief Justice Waite (in each instance speaking for the Court) had previously said: "A case may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction of the Constitution of the United States, or sustained by the opposite construction." (175 U. S. 580.)

In Colorado, etc., Co. *v.* Turck (1893) 150 U. S. 138, a writ of error issued to a circuit court of appeals was dismissed for want of jurisdiction in the Supreme Court to review the case. It was said that when "the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of a suit depends upon some question of a Federal nature, it must appear, at the outset, from the *declaration or the bill of the party suing*, that the suit is of that character." (150 U. S. 143.) "The Federal question now suggested did not emerge until the defendant set up its second defence," but "the jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred." (150 U. S. 144.)

In the Blackburn case, the Turck case was reviewed,

and it was said: "As the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the Circuit Court could take jurisdiction, irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question." (175 U. S. 585.) So that the second of the two defences, that the clerk did not receive the money by virtue of his office, is "one of mere fact in which the validity of the statute was not drawn into question," and that defence cannot give this court jurisdiction of the cause.

Seeberger *v.* McCormick (1899) 175 U. S. 274 was held to present a question of "general law, and not one to be solved by reference to any law, statutory or constitutional, of the United States," and hence it was decided, no Federal question was presented. (175 U. S. 280.)

In McCain *v.* Des Moines (1899) 174 U. S. 168, 177, it was asked: "How can it be said upon such facts that any question arises under the Constitution or the laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other."

So in the case at bar, whether, as Judge Adams said, *by legal intendment*, as distinguished from a statutory provision, a private suitor may sue on the bond of a clerk of a court, is not a question of statutory construction, or, to put it in another way, the right of Stewart to maintain this action is not defeated by a construction that the act of Congress does not of itself or in express terms authorize the action. Whether under principles of general law, as distinguished from an act of Congress, as decided by the Circuit Court and the Circuit Court of Appeals, this action can be maintained, does not present a question of a Federal nature.

In Bausman *v.* Dixon (1899) 173 U. S. 113, a receiver appointed by a Federal court was held suable in a State court. "It is true the receiver was an officer of the Circuit Court, but the validity of his authority as such was not

drawn in question. * * * The liability (of the receiver) to Dixon (the injured party) depended on principles of general law applicable to the facts, and not in any way on the terms of the order" appointing the receiver. (173 U. S. 114.)

In Third Street, etc., Company *v.* Lewis (1899) 173 U. S. 457, an appeal from a circuit court of appeals in a suit in equity to the Supreme Court was dismissed for want of jurisdiction. It was said: "The Circuit Court of the United States has no jurisdiction, either original or by removal from a State court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim (citing authorities). If it does not appear at the outset that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence. And when jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, although another ground of jurisdiction may be developed in the course of the proceedings." (173 U. S. 460.)

In Pope *v.* Louisville, etc., Ry. Co. (1899) 173 U. S. 573, a suit brought by a receiver appointed by a Federal court was held not to arise under the laws of the United States. "The liability of defendants (to the receiver) *arose under general law*, and was neither created nor arose under the Constitution or laws of the United States." (173 U. S. 579.) "The bill nowhere asserted a right under the Constitution or laws of the United States, *but proceeded on common-law rights of action.*" (173 U. S. 578.)

In conjunction with this line of cases, we consider it proper to cite to the Court some cases which may be relied on to support the jurisdiction of the Court.

In the Pacific Removal Cases (1885) 115 U. S. 1, a suit against a corporation, organized under an act of Congress, was held to be "one arising under the laws of the United States," because "the charter of incorporation not only creates it, but gives it every faculty which it possesses. * * * This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States."

(115 U. S. 13.) But a clerk of a court, even of a circuit court of the United States, is not so limited. As Judge Caldwell said: "Under the law and the practice of *all the courts*, State and Federal, it was the official duty of the clerk to receive and safely keep the money." (Rec., p. 37.)

In Gableman *v.* Peoria, etc., Railway Co. (1900) 179 U. S. 335, it was held a receiver appointed by a Federal court could not remove a case brought against him to the Federal court on the ground that it arose under the laws of the United States. The Court, however, was particular to say: "Nor are the cases against United States officers as such, or on bonds given under acts of Congress * * * in point." (179 U. S. 339, 340.)

With respect to a marshal of the United States, a right of action is given against him by "the laws of the United States, which make the marshal responsible for trespasses committed by him in his official character." (172 U. S. 405.) The law referred to is Section 784, Revised Statutes of the United States, "which *expressly gives the right of action.*" (109 U. S. 424.) So that with respect to a marshal, a statute expressly gives a cause of action and therefore a suit against him on his official bond arises under the laws of the United States.

Feibleman *v.* Packard (1883) 110 U. S. 421;
Sonnentheil *v.* Christian Moerlein Brewing Company (1899) 172 U. S. 401;
Bachrack *v.* Norton (1889) 132 U. S. 337.

But in Walker *v.* Collins (1897) 167 U. S. 57, it was held a marshal of the United States, sued individually for trespass, could not remove a case to the Federal court as one arising under the laws of the United States.

In Auten *v.* United States National Bank (1899) 174 U. S. 125, an action against a receiver of a national bank was held arising under the laws of the United States.

We have thus presented some of the authorities on the subject to enable the Court to solve for itself the question of jurisdiction. It is a question which the Court is bound to consider and cannot be waived by counsel. The question is presented in a peculiar way. The petition filed in

the Circuit Court alleged a diversity of citizenship and the necessary jurisdictional amount. It then alleged that Warren Watson, as clerk, had given a bond conditional for the faithful performance of the duties of his office and had made a breach of his bond. A judgment was rendered in favor of Stewart in the Circuit Court and affirmed by the Circuit Court of Appeals. The sureties on the bond sued out a writ of error from the Supreme Court on the ground the suit is one arising under the laws of the United States, and then invoke as a defence that, under no possible state of facts, can a suit arise under the laws of the United States.

II.

It is asserted by plaintiffs in error: "The bond here is the statutory bond. About this there has been and will be no dispute. * * * (It) created the statutory liability and none other." (Brief, p. 8.) It is of course a convenient method of disposing of a plaintiff to outline his position and then demolish it. It is true Watson was appointed a clerk of a court of the United States and that he gave a bond with the conditions prescribed by statute. But the bond sued on is to be construed as any instrument in writing, according to its terms. If a statute requires a bond to be taken and then gives to the bond a construction or effect which it otherwise would not have, then, of course, such statutory construction is binding. But where a bond is given, whether pursuant to statute or not, and no statute limits or controls the meaning of the bond, then, whether the obligation be treated as a statutory one or one to be determined according to the principles of the common law, the result is the same: The sureties bound themselves that the clerk would "faithfully perform all the duties of the said office of clerk."

"It needs no statute to enable an officer to give a valid bond for the faithful payment of money that may come into his hands, and if we regard the bond in suit as a common-law obligation without looking for aid to the statute which the parties undertook to follow in drafting it, it will

be seen that the fair import of the language used is that the bond was intended for the benefit of all whom it might concern—that is, anyone who should be injured by the treasurer's official delinquency. * * * The statute contemplates that the State shall stand as trustee for the parties who have the beneficial interest in such cases."

State *v.* Wood (1889) 51 Ark. 205, 209, 210 (Cockrill, J.)

In this connection, we call particular attention to the language of Judge Cooley in Bay County *v.* Brock (1880) 44 Mich. 45, 6 N. W. Rep. 101:

"This is an action upon the official bond of Martin W. Brock, late sheriff of Bay County, brought by Houghtaling and Romeyn, who allege as their injury the neglect to levy an execution issued to him upon a judgment in their favor, and a false return thereon. The case in the court below turned upon the validity of the bond, which unfortunately had not been framed in conformity to the statute. The statute requires the bond to be given to the people of the State in the penal sum of $16,000, with condition that if the principal obligor shall well and faithfully in all things perform and execute his office of sheriff during his continuance in office by virtue of his election, without fraud, deceit or oppression, and pay over all moneys that may come into his hands as sheriff, then the obligation to be void, otherwise of force. Comp. L., Sec. 551. The purpose of the bond is sufficiently indicated by the condition; it is to protect and give indemnity to all persons in whose favor a duty may arise, to be performed by the sheriff, and who may be damnified by neglect or failure in performance. The State, or what is equivalent, the people of the State (People *v.* Love, 19 Cal. 676) is made the obligee, as mere naked trustee for those who might become entitled to the protection of the bond, and who, of course, can never be known at the time the bond is taken, but will be pointed out by such subsequent events as charge the sheriff with a duty in their favor. * * *

"The defect in the bond now under consideration is that it names the county of Bay as the nominal trustee instead of the State. For this reason it is said to be absolutely void,

and the parties who have relied upon it as security, who themselves had and could have had no voice or influence in shaking or taking it, but who had a right to suppose that the public authorities, charged with a duty in the premises, would correctly perform that duty, are now, in consequence of this error, left to suffer the loss of important rights without redress. It seems, at first blush, a very small error to have such important consequences, for the obligee named in the bond has no active duty whatever to perform, being neither consulted when the bond is taken nor afterwards when it is sued, and having, in fact, no control over it except as a public officer holds it for safe-keeping.

"If the several duties which the sheriff is called upon to perform could only arise because of the statute requiring the giving of the bond, there would be abundant reason for saying that until a bond in conformity with the statute was produced, no recovery could be had. But this statute does not impose the duties; they would be the same if no official bond were required, and a sheriff *de facto* is charged with them under the same circumstances as is a sheriff *de jure*. It needs no statute to enable the officer to give a valid bond to perform any such duty; and had Brock executed to Houghtaling and Romeyn a common-law bond, conditioned that he would duly levy and return the execution they placed in his hands, there could have been no doubt of its validity. United States *v.* Tingey, 5 Pet. 115; Thompson *v.* Buchannon, 2 J. J. Marsh, 416; Governor *v.* Allen, 8 Humph. 176; Montrille *v.* Haughton, 7 Conn. 743; Commonwealth *v.* Wolbert, 6 Binney, 292. And any bond that may voluntarily be given to a party for his benefit will be equally valid if given to another for him. Van Hook *v.* Barnett, 4 Dev. 268.

"And in the case last cited this principle was applied to the bond of office of an administrator, which, though given to the county justices when the statute required it to be given to the governor, was held to be a valid common-law bond and available as such to any person in whose favor a cause of action against the administrator might arise. I can see no difficulty in the application of this doctrine to the bond now in suit except that the damages to which a

sheriff may become liable to different persons may indefinitely exceed the penalty of the bond; but it might well be held that recoveries could be had not exceeding the penalty in all. Commonwealth *v.* Wolbert, *supra.*"

In Comm. *v.* Reed (1866) 2 Bush (Ky.) 618, it was argued that the commonwealth for its own use had no cause of action on the official bond of a sheriff. Judge Robertson said: "Although there may have been no precedent of any judicial recognition of such a remedy, yet we can perceive no reason why it should not be available." And in an interesting opinion he holds that the commonwealth, "*as well as a citizen*," may sue on the bond and this "upon *common-law principles*," a local statute being characterized as "confirmatory, and, as we think, only declaratory of the common law."

"Whenever a new right occurs or is created by either contract or operation of law, if no peculiar remedy be appointed for it by statute, the usual remedy for the class of cases to which it belongs will be appropriate. * * * If, therefore, the bond be good at common law, the common-law remedy for enforcing it is not only proper, but is the only one which can be applied. * * * The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily and for a valid consideration and if not repugnant to the letter or policy of the law." (Robertson, J.)

Thompson *v.* Buchannon (1892) 2 J. J. Marsh (Ky.) 416.

A bond given to a judge of probate by one to whom the whole of the real estate of his ancestor has been assigned conditioned to pay to the other heirs their respective proportions of such estate is extra-official, but "undoubtedly good at common law." (Parker, J.)

Thomas *v.* White (1815) 12 Mass. 367, 370.

"It is admitted the bond (in suit) is not a statutory bond in replevin. On this appellants make their third point, which is that appellee, as sheriff, had no right to demand or receive this bond and no right to recover on it, even admitting that it was duly executed by the appellants. To

this it is answered the statutes of this State nowhere forbid taking such a bond, and if not expressly authorized by statute, it is nevertheless a good obligation at common law. The authorities cited by appellee sustain this position. Fournier *v.* Faggot, 3 Scam. 347; Pritchett *v.* The People, 1 Gilm. 525, where the general rule was said to be that any obligation entered into voluntarily and for a good consideration was valid at common law, when it does not contravene the policy of the law, and is not repugnant to some statutory provision. Other courts hold the same doctrine, and we have no occasion to disavow it." (Breese, J.)

Wolfe *v.* McClure (1875) 79 Ill. 564, 566, 567.

"Even if the bond be not a good statutory bond, a point which it is not now necessary to determine, it does not therefore follow that it is of no validity. It was entered into voluntarily and upon a sufficient consideration, and is, we think, a binding obligation at common law. * * * Numerous cases are reported in which it is held that bonds void as statutory bonds are, notwithstanding, binding at common law.

State *ex rel. v.* Lynch (1843) 6 Blackf. (Ind.) 395, 396.

"It is argued for the defendants that the bond is void because no law requires or authorizes a bond to be given *to selectmen* by a town treasurer or a collector of taxes; the Rev. Sts. *c.* 15, requiring such treasurer and collector to give bond *to the town*. On the other hand, it is insisted for the plaintiffs that the bond, though not made conformably to the statute, is valid by the common law." This position was held "sustained by authority" and so decided.

Sweetser *v.* Hay (1854) 2 Gray, 49, 51.

"It cannot be maintained that if a bond is executed without any undue advantage or any degree of oppression or extortion, by one undertaking to serve the public, that a mistake in the name of the obligee will avoid the instrument. If not valid as a statutory bond, it will be held good as a common-law security."

Gathwright *v.* Callaway County (1847) 10 Mo. 663, 666, 667.

"This was not an office bond according to the statute, because the penalty is ten thousand dollars, instead of twelve thousand dollars, as required by the statute, and because it was not approved and recorded as the statute directs. * * * A bond executed by a public officer and securities, though not good as a statutory bond, may nevertheless be binding as a voluntary obligation upon which an action at common law can be maintained."

Goodrum *v.* Foley (1841) 2 Humph. (Tenn.) 490, 492.

In Claasen *v.* Shaw (1836) 5 Watts (Pa.) 468, speaking of a bond taken by a constable conditioned for the satisfaction of an execution in his hands, it was said: "Being therefore void as a statutory obligation, the question is, Is it good at common law? And we are of opinion that it is."

To the same effect is Williams *v.* Coleman (1872) 49 Mo. 325, 326.

"Although the instrument may not conform to the special provision of the statute or regulations with which the parties executed it, nevertheless it is *a contract voluntarily entered into upon a sufficient consideration for a purpose not contrary to law.*"

Carnegie *v.* Hulbert (1895) 70 Fed. 209, 216.

So that whether the bond sued on is in the form prescribed by statute or not, it "is a contract voluntarily entered into upon a sufficient consideration for a purpose not contrary to law," and in the absence of a statue enlarging or restricting its operation, it is to be determined by a resort to the principles of the common law.

III.

Counsel for plaintiffs in error very frankly assert: "The statutes of the United States required bonds to be given by the clerks of the circuit courts *solely* for the protection of the United States, and *not at all for the protection of private parties.*" (Brief, p. 8.)

This proposition, to one acquainted with the procedure in Federal courts, is so startling and so fraught with dan-

ger and mischief that it carries with it its own refutation. Indeed, no authority is cited by plaintiffs in error directly in point, and to the credit of the clerks of the courts, it may be said but two cases are found in the reports where this precise question has arisen, the case at bar, United States *v.* Howard (1899) 93 Fed. 719, Rec., pp. 23-28; Howard *v.* United States (1900) 102 Fed. 77, Rec., pp. 31-40, and *In re* Finks (1889) 41 Fed. 383.

The case at bar was tried by Adams, J., on the circuit, and Caldwell, Sanborn and Thayer, JJ., sat in the Court of Appeals. All were unanimous, and in both courts opinions were filed. (See citation, *supra.*) The case was heard by Judge Adams February 18, 1889, and taken under advisement. (Rec., p. 10.) It was decided April 26, 1899. It was argued in the Court of Appeals, January 9, and decided April 9, 1900. (Rec., p. 30.) Nothing is presented to this Court that was not there urged with signal ability. The brief for plaintiffs in error is largely a reprint of that which was filed in the Circuit Court of Appeals.

In view of the demands made upon this Court and the increased area of its jurisdiction, the Court might well content itself with adopting the opinions heretofore rendered in this case. But in addition to the opinions in this case below, *In re* Finks (1889) 41 Fed. Rep. 383, is a direct authority in support of our right to recover. The sureties in that case contended "that no liability rests on them for the failure of the clerk to properly account for the money received by him in this case, because they say the court had no power to appoint the clerk receiver of a fund paid into the court; that the undertaking of the sureties extended only to the duties of the clerk, as clerk, and not those of a receiver." (41 Fed. 385.) This case is cited approvingly by the Circuit Court of Appeals in the opinion filed in the case at bar. (102 Fed. 84, Rec., p. 39.) It is true the point now urged, the sureties on the bond of a clerk of a court of the United States are not liable to an action at the relation of a private suitor, was not urged in the Finks case; but the very fact that neither the court nor the counsel in the Finks case thought of such a contention shows what the "common consent and opinion" of the legal profession has been,

which "of itself is a very pregnant circumstance, and very good evidence of what the law is."

Venable *v.* Wabash Western Ry. Co. (1893) 112 Mo. 103, 125.

As Judge Caldwell said: "For more than a century the clerks of the Circuit Courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner, and during that time neither the clerks nor the suitors nor the Court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys that they were receiving as such." The learned jurist, after citing the statute fixing the compensation of the clerk for receiving, keeping and paying out money, continued: "This poundage has always been allowed to them on moneys received and paid out by them. Nothing short of legislation can change the law as established by more than a hundred years of uniform and constant practice of the courts. The money sued for in this action was paid into court and received by the clerk in a 'cause pending in said court,' and it was the duty of the clerk to 'forthwith' deposit the same as required by Section 995. His failure to do so was a breach of the condition of his bond, for which the sureties are liable to the person suffering damage thereby." (102 Fed. 81, 82, Rec., pp. 36, 37.)

And Judge Adams said: "Considering all these things, it seems unreasonable to say that all Congress intended, by providing for a bond from clerks of the circuit court was to secure the United States itself against damage by official misconduct. On the contrary, the language of the act, construed in the light of the duties imposed upon the clerk and in the light of the obligations of the United States in the performance of its governmental functions connected therewith, conduce plainly to the result that such bond is intended for security for all suitors in this Court, and being so intended, an implied authority necessarily arises, permitting such suitor to put the bond in suit in the name of the United States to his use, for the redress of wrongs within the purview of the bond." (93 Fed. 721, Rec., p. 25.)

Let us recur to the condition of the instrument sued on. It is that the clerk "shall faithfully perform all the duties of the said office of clerk and seasonably record the decrees, judgments and determinations of said court." (Rec., p. 7.)

One of the most important of the duties of a clerk is to receive, keep and pay out money.

The statute (U. S. Stat. (1878) Sec. 795) requires a bond conditioned as the one sued on in the case at bar. (See United States *v.* Ambrose (1880) 2 Fed. Rep. 552, 553.) In the case just cited, an additional condition was inserted: "And shall properly account for all moneys that may come into his possession, as required by law." And "the defendants answered that the attorney-general required him (the clerk) to give the bond sued on containing a condition not required by statute, and that said bond, having been thus extorted under color of office, was void." (P. 552.) But, said Mr. Justice Swayne, speaking of this additional condition: "I am clear, upon reflection, under my view of the subject, that the entire liability covered by that language was covered by the more general terms which preceded, to-wit: 'that the clerk should faithfully discharge the duties of his office,' etc. Now one of the first and most important of the duties of the clerk undoubtedly is to pay over moneys that may come into his hands and which by law he was required to pay over." Of the additional conditions he observed: "They are no more comprehensive, they are no more onerous in any respect, as it seems to me, than if this specific requirement attached to it had not been contained in the bond at all." (P. 554.)

In Kitchen *v.* Woodfin (1877) Fed. Cas. No. 7855, 1 Hughes, 340, Judge Dick ruled that "when he (the clerk) receives money he incurs risk and responsibility. * * * The law imposes on a clerk the duty of receiving money collected on an execution when returned by the marshal. This legal requirement imposes *only an official duty* and does not constitute the clerk an agent of the plaintiff. * * * *The clerk is an agent of the law and not of the parties in suit*, unless made so by express agreement, or by acts from which such agency may be inferred."

It is conceded that under Section 784, Rev. Stat. of the United States, 1878, "in case of a breach of the condition of a marshal's bond, any person thereby injured" may sue in his own name and for his sole use on the bond. (Brief of Plaintiffs in Error, p. 22.)

But Mr. Justice Brown has ruled that "moneys received by the marshal should under these sections (995, 996) either be immediately deposited by him *or paid to the clerk* and by him deposited."

Fagan *v.* Cullen (1886) 28 Fed. Rep. 843, 844.

Would anyone for a moment believe that Mr. Justice Brown would decide that a bonded officer, a marshal, should pay money to the clerk, who, according to the contention of defendants, is, except as to the United States, an unbonded official?

In Blake *v.* Hawkins (1883) 19 Fed. 204, the defendants paid money to the clerk of a court, but denied his right to a commission of one per cent. In discussing this question, Judge Seymour said that it was safe for the defendants (not the United States, but private parties) to pay the clerk. "The judgment *and his official bond, one or both*, were their protection." (19 Fed. Rep. 205.) But what protection is an official bond on which no suit can be maintained?

Judge Dillon has ruled that the one per cent allowed by statute (Rev. Stat., Sec. 876) "is for compensation to the clerk for the trouble and *responsibility* of actually receiving, keeping and paying out money."

In re Goodrich (1878) 4 Dill. 230, Fed. Cas. No. 5541.

"The compensation of the clerks is for the trouble and *responsibility* of actually receiving, keeping and paying out money."

Smith *v.* The Morgan City (1889) 39 Fed. Rep. 572, 573 (Simonton, J.)

In The Avery (1814) Fed. Cas. 671, Mr. Justice Story said that the "known and uniform practice of the court, * * * a practice not only founded in the settled doctrines of the admiralty, but also of great importance for the *security of suitors*," required the marshal selling a vessel to do

as was done in that case: "The proceeds (were) paid over to the clerk of the district court." (2 Fed. Cas., p. 241.) What security has a suitor if he cannot sue on the bond of the clerk?

In Northwestern Mut. Life Ins. Co. *v.* Quinn, 69 Fed. Rep. (1895) 462, 464, Judge Lurton, speaking of certain money, said: "Certainly, the clerk was never responsible for any part of it, *and his bond had never protected it.*" That case arose on a question of the taxation of costs. The clerk claimed a commission on certain moneys, but because, among other things, "*his bond had never protected it*," the commission was disallowed, and yet in the case at bar it is gravely asserted that the bond of the clerk never does protect money in his hands.

The real plaintiff in this case, David D. Stewart, is himself a lawyer, and his assistance in the preparation of this brief is cheerfully acknowledged. We extract from his letters the following:

"Now in relation to this suit:

"1. It is fair, and perhaps necessary, to assume that Congress would intend to require a bond from the clerk of the United States courts that would protect all suitors who had money in those courts. The majority of congressmen are lawyers who would understand the necessity of such protection.

"2. The bond required by Rev. Stat. U. S., Sec. 795, provides that the clerk shall 'faithfully discharge the duties of his office and seasonably record the decrees, etc., of the court.'

"It is not easy to see what interest the United States can have in the condition of this bond except in suits to which they are a party. The decrees and judgments of the court in all other suits are in the sole interest of the parties to those suits. And while the United States are parties to one suit on the docket of the Circuit Court, there are probably fifty and perhaps a greater proportion of suits of ordinary litigants. It was the intention of this act of Congress to require such a bond as would protect the rights of these litigants as well as those of the United States. And it could all be readily done in one bond, the United States

acting as trustees for all ordinary litigants; and in their own right and for themselves where they had a pecuniary interest.

"3. It has often been held that the words 'faithfully discharge the duties of his office,' when applied to an officer in whose custody money is to be placed, make him responsible for such money.

Framington *v.* Stanley, 60 Me. 472.
Porter *v.* Stanley, 47 Me. 518.
United States *v.* Tingey, 5 Pet. 115.
Amherst Bank *v.* Root, 2 Metc. (Mass.) 538.
United States *v.* Hodge, 6 How. 279.
Gaussen *v.* United States, 97 U. S. 584.
United States *v.* Hodson, 10 Wall. 395, 407, 408.
Middlesex Mfg. Co. *v.* Lawrence, 1 Allen 339.
Bank of the United States *v.* Dandrage, 12 Wheat. 64.

"Congress evidently recognized this meaning of the words of the condition of the clerk's bond, and provided that 'for receiving, keeping and paying out money in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid, shall be allowed.' (Rev. Stat. U. S., Secs. 828, 995 and 996.)

"When, therefore, the United States authorized the giving of such bond by the clerk as is specified in Sec. 795, it seems to me that they constituted themselves trustees for the benefit and protection of all suitors in their courts. And when the sureties executed the bond with the clerk, it seems to me that these sureties and the clerk consented and agreed to make the United States trustees for all suitors in court and for all persons having a legal interest in any moneys deposited in court with the clerk.

"And it necessarily follows, it seems to me, that an implied promise or covenant in the premises, and growing out of the relations between the respective parties, arises that suit might be brought in the name of the trustees for the benefit and protection of the *cestui que trust*, viz., the suitors in the court.

Sweetser *v.* Hay, 2 Gray, 49, 52.

"And it further seems to me that Secs. 783, 784, 785 and 786, instead of militating against this conclusion, support it. Without Sec. 784, the marshal's bond would have stood exactly like the clerk's with the same inferences and rights secured by it, with right of any person injured by the official acts of the marshal to institute a suit in the name of the obligees (the United States) as trustees, to recover his damages.

"By Sec. 784 an additional or cumulative remedy is given to all such parties by allowing a suit directly in the name of the party damaged.

"As no such provision as this is attached to Sec. 795, the remedy is confined to a suit in the name of the obligees in the clerk's bond.

"The conclusion, it seems to me, is unavoidable, that the act of Congress required the clerk to give the bond specified in Sec. 795, and that it was plainly intended to protect all suitors from the wrongful acts of the clerk, especially from the embezzlement of moneys entrusted to his keeping by suitors in court, and under the order or direction of the court.

"The bond is a contract. 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of its enforcement. This is the breath of its vital existence. * * * The ideas of right and remedy are inseparable.'

Edwards *v.* Kearzey, 96 U. S. 600.

"No other form of action being provided by Sec. 795 than is given by the common law upon all bonds, the inference is irresistible that Congress expected and intended that every *cestui que trust* under the bond—*i. e.*, every suitor injured by the clerk's not 'faithfully discharging the duties of his office,' would have ample remedy by suit upon the bond in the name of the obligees in that bond as trustees for his benefit and protection.

"The judge of the circuit court has no power or authority to require the clerk to give any other bond than that provided by Sec. 795.

United States *v.* Tingey, 5 Pet. 115.

"The inference follows irresistibly that Congress intended and regarded that bond as ample protection to all suitors in the United States courts; and that, in the absence of any special statute remedy (like Sec. 764) upon such bonds, the common-law remedy must be followed, viz., an action of debt upon the bond for the benefit of the injured party. Like a suit brought by the assignee of a chose in action in the name of the assignor who impliedly promises to stand as trustee and to do no act which will interfere with or affect the suit carried on in his name.

"4. The authorities already cited show that no judgment against the clerk alone is necessary before suit upon the bond.

"5. The provisions in the statutes of the different States, authorizing parties injured to bring suit upon the bond in the name of the State, appear to me to be cumulative or explanatory merely—really adding nothing to the rights of such parties, but making provisions that the State shall not be liable for the costs in such suits.

"It seems to me that when an act of the Legislature of a State or of Congress prescribes a bond or other form of security or obligation, to be given by any of its officers *for the protection of parties* whom the acts of such officer may injure, if no special form of remedy is given by the statute, the inference must follow that the remedy afforded by the common law is to be resorted to and that the Legislature regarded such remedy appropriate and ample, and intended it to be pursued.

Knowlton *v.* Ackley, 8 Cush. 97.

"Every form of contract or obligation known to the common law carries with it the common-law remedies.

"Statutes may furnish additional remedies which will be regarded as cumulative merely, unless the language of the statute is such as clearly makes such statute remedies exclusive.

Comm. *v.* Green, 12 Mass. 1.
Gooch *v.* Stephenson, 12 Me. 371.
State *v.* Boies, 41 Me. 346.

"It seems to me that the United States are but formal

or nominal parties, acting by force of their own legislation (Sec. 795) as trustees for suitors in their courts; that all the obligors in the bond conclusively assented to this arrangement by executing the bond, and covenanting to indemnify such suitors for any breach of the bond by the clerk. The suit at law must be brought in the name of the obligees, but the real parties are myself, a citizen of the State of Maine, and the clerk and sureties, citizens of the State of Missouri. I think the case is exactly like and is supported by Maryland *v.* Baldwin *et al.*, 112 U. S. 496.

"See, also,

Browne *v.* Strode, 5 Cranch, 363.
McNutt *v.* Bland, 2 How. 9.
Walden *v.* Skinner, 101 U. S. 589.
Huff *v.* Hutchinson *et al.*, 14 How. 586.

"I do not see how the United States have any interest in having the records made up, except in suits where they are the real parties."

Again he writes:

"The case cited from Wheaton (10 Wheat. 406) is undoubtedly sound law, and never questioned so far as I am aware. It is familiar law here. It is simply the old common law, that nobody can maintain a suit upon any chose in action non-negotiable, except a party to it. There was a bond given by one private party to another. The court simply decided that a third person could not maintain a suit upon it.

"It strikes me that our suit is wholly different. Here is an official bond, given under an act of Congress, or required by an act of Congress to be given by a clerk of the court created by Congress, with a condition that such clerk 'shall faithfully perform all the duties of the said office of clerk,' etc.

"What are those duties? The common law must be resorted to for most of them. A few are particularly specified by statute provisions. Among the duties of this clerk, he is bound to receive all moneys paid into the court by parties litigant, in the regular course of judicial proceedings, *and to keep them safely* for the parties eventually entitled to

them. And in several decisions of the Supreme Court they evidently recognize the clerk as responsible for the moneys paid into the court for parties litigant, and that such parties are as well secured when the money is in his hands as they would be if paid to the marshal or sheriff.

"This could only be upon the theory that they can hold the clerk's bondsmen, for he might personally be entirely worthless.

"It seems to me that the only real question in our case is whether the statute of the United States which prescribes the form of the clerk's bond, and makes it broad enough in terms to cover all his duties as clerk, does not *per se* authorize every person whose money comes into the hands of the clerk in the regular course of judicial proceedings, to maintain a suit on his bond to recover it; and whether it is not *per se* exactly equivalent in meaning and effect to the express provision authorizing a suit by a third person on the marshal's bond, though in case of the clerk authorizing the suit in the name of the obligee. The marshal is an executive officer. He has no duties to perform which are not executive in their nature. He seizes your property or mine wrongfully. He may be personally quite irresponsible. Neither of us, being third parties, could at common law maintain any suit on his bond for such unlawful seizure, for no statute provision authorizes him to make such seizure. He acted entirely in his own wrong. Of course, we could maintain trespass or trover against him personally at common law, but we could not maintain a suit on his bond, because its condition contains no provision authorizing him to perform the act of which we complain.

"Hence the necessity of a statute to enable us to sue on his bond for his unlawful acts.

"But the clerk is mainly a ministerial officer—perhaps partly in rare instances a judicial officer. Very few of his duties are defined by statute provisions. We are compelled to resort to the common law, which includes the practice of the courts, to know what his duties are.

"I recall no statute provision requiring him in terms to receive money in any case. I may have overlooked some statute. But a statute provision exists providing a commis-

sion for him upon moneys paid out by him to parties entitled to it. And this statute would be construed by the court, I presume, as an implied authority, probably an implied command, to receive and take care of it. And the commission is his compensation for such care.

"Money paid into court as a tender before suit; or upon some count under leave of court at common law; or as the terms upon which some amendment was granted; or upon sale of the property under a foreclosure or to satisfy some judgment recovered; or upon any proper order of the court in the course of judicial proceedings; or money brought into court upon a bill in equity to redeem a mortgage; or to execute a trust in some suit in court—all these (and others may readily occur) are cases where it becomes the duty of the clerk to receive and take care of the moneys so paid into court. The condition of his bond specifically requires him to faithfully perform all the duties of the office of clerk. This could only be for the benefit of the parties owing the moneys entrusted to his care. And if the statute under which this bond was given was intended by Congress to secure the faithful performance of the duties of the office of clerk, then, *per se*, it impliedly authorizes the injured party to maintain a suit in the name of the obligees (the United States) to recover the damages sustained. Otherwise, this particular condition of the bond is meaningless and a nullity, because it cannot be enforced in any other way. No suit can be maintained in the name of the party owning the money without express statute authority, because it would be contrary to the rule of the common law. But it was entirely competent for the obligees in such bond to act as trustees for the parties in interest.

"Like the assignor of a non-negotiable chose in action, an assignment of such chose carries with it at common law an implied authority to the assignee to treat the assignor as a trustee, and to bring suit in his name.

"So in this case it seems to me that this bond running to the United States, not only provides for the faithful performance of such duties as the United States needed (as the recording of judgments, decrees, etc.), but also provides that all duties owed by the clerk to third persons who are suit-

ors in the same court shall be equally 'faithfully performed,' and it carries with it an implied agreement on the part of the United States to stand as trustees for all such persons, and is, therefore, *per se*, an authority to such persons to institute suit in the name of such trustees. Unless this is so, all the conditions of the bond, except those relating to recording judgments and decrees of the court, become a sheer nullity. And until the Supreme Court of the United States decides otherwise, I should be strongly inclined to believe that the statute provisions and the conditions of the bond authorized by it constitute an implied agreement on the part of the United States, the obligees in the bond, to act as trustees for all persons injured by the default of the clerk in not accounting for moneys paid into court in the regular course of the judicial proceedings of said court; and an implied authority to all such persons to maintain a suit in the name of such obligees for the benefit of such persons.

"The bond ran to the United States as obligees. But what were its conditions? Evidently of a double character. The lawyers of Congress were familiar with the duties required of the clerk, among which were the keeping and safe custody of all moneys paid into court by parties litigant, and also to keep proper records of the judgments and decrees and orders of the court. The conditions of the bond were intentionally made broad—sufficiently so to protect parties in court, and to insure the recording of the doings of the court. In the latter branch the United States were interested as representing the general public. In the former, suitors in court only. As the bond could not be made running to each suitor as obligee, it was properly made running to the United States as obligees, but in trust for the benefit of all persons having an interest in the proceedings of the court. This was, therefore, equivalent to an implied promise on the part of the trustees to allow suits to be instituted in their name for the benefit of all persons who are covered and protected by its conditions. Unless this is a sound conclusion, then not a suitor in all the courts of the United States has the slightest protection from the embezzlements of irresponsible clerks.

"Of course, it is elementary law as held in 10 Wheat.

406, and everywhere else in the common-law world, that no person can maintain a suit in his own name on an official or private bond not running to himself as obligee, unless some statute authorizes it. But it is equally well settled that a *cestui que trust* can maintain a suit in the name of his trustee to enforce his rights, and that an implied promise on the part of the trustee allowing such suit is always inferred by law. Upon these principles I came to the conclusion that this suit was properly brought in the name of the United States as trustees, and that the statute providing the conditions of the bond carries an implied authority to bring such suit for every malfeasance of the clerk in the performance of his duties to suitors in the courts.

"The United States could not be expected *ex mero motu* to take notice of the countless instances all over the various States of the malfeasances and embezzlements of the various clerks, and unless the parties injured can maintain suits in the name of the obligees in the bond, as trustees, under this implied authority, the bond is valueless, and all parties in court unprotected.

"The suit now pending is a suit upon the bond of the clerk of the court for the embezzlement of money paid in to him in his official capacity of clerk by one party to a suit in court and entered of record so paid. The embezzlement is a breach of his bond. In the absence of a statute authorizing a suit by the injured party in his own name, a suit for such breach can be maintained only in the name of the obligees in the bond as trustees for the injured party, under the implied authority of the statute prescribing the conditions of the bond. This authority is just as good (it seems to me) as an express statute provision authorizing such suit, or authorizing a suit in the name of the injured party."

On November 14, 1898, he writes:

"St. Albans, Maine, 14 Nov., 1898.

"Hon. J. V. C. Karnes:

"Dear Sir,—Just at the time when I wrote you last I received notice from the clerk at Washington that two cases on writs of error, which I failed to reach at last term, would be reached in a short time, and I was obliged to leave home

immediately after writing you; and have unavoidably run much beyond the week mentioned in that letter.

"On my way I called to see the clerk of the circuit court in Boston, Mr. Stetson. He told me he had been clerk of district, circuit and appeals courts more than thirty years in all, and he understood (though he did not recall any specific case) *that any person suffering loss through misfeasance* or embezzlement of the clerk, could sustain a suit on his bond in the name of the United States as trustees. And he suggested that if the money deposited with the clerk as a tender or under any law or order of the court (as in a foreclosure suit) was deposited by the clerk in any depositary fixed by the court, the clerk would be released and the United States would be liable as trustees to parties entitled to the money and liable for its safe keeping; while if the clerk did not so deposit it, he would be liable on his bond to parties entitled to the money, and that the liability must be enforced in the name of the United States as obligees and trustees for the benefit of the parties so entitled—that in the first case the United States were trustees for the money, and in the other case were trustees in the bond for the party entitled to the money.

"I had not thought of his first suggestion, but it has always seemed to me that the second was sound law.

"The clerk's bond was certainly intended as security for the payment of all moneys deposited in the court in the due course of proceedings in court, and in the absence of a statute authorizing a party injured to bring suit in his own name on the bond, the statute implies an authority to maintain such suit in the name of the United States as irrevocable trustees for the injured party.

"I have examined many authorities during the summer and fall, and find none which militate against this view, but many which indirectly and directly sustain it. (Citing cases named in the opening of this brief.)

"Suppose there was no such statute provision as that in Burns' Stat., Sec. 253; but all official bonds throughout the State were required by statute to be in the name of the State, executors, administrators, collectors of taxes, clerks of courts, sheriffs, deputies, marshals, coroners, constables,

treasurers of cities, of towns, etc., etc. Do not all such bonds imply, by force of the statute, that the obligees, the people of Indiana (or the State of Indiana) give their consent to become trustees for the parties in interest, and the obligors in the bond give their consent to the State's becoming such trustee, and agree to make them trustees for all parties protected under the bond; out of all which *an* assent is implied by law to a suit by the trustees, and in the name of the trustees, for the benefit of any party injured; and the common law of the State affords the people form of suit or remedy? The statute is simply affirmative of the common law, which would stand exactly the same without it.

State to use of Mayor *v.* Norwood, 12 Md. 177, 194.
Maryland *v.* Baldwin, 112 U. S. 490.

"In Gelpecke *v.* Dubuque, 1 Wall. 220, 221, the power to subscribe for stock in a railroad and issue bonds in payment was held by the court to be implied, though not conferred directly.

"In Osborn *v.* United States Bank, 9 Wheat. 865, the court held that the power to do a general banking business was implied in its charter, because necessary to its performance of the governmental objects and purposes of the act of incorporation.

Osborn *v.* Bank, 9 Wheat. 860 *et seq.*

"In Corporation of Washington *v.* Young, 10 Wheat. 406, the suit was not upon an official bond given under some statute, but upon a bond at common law between obligees and obligors, of whom the plaintiff—in fact, McCue *et al.* were neither.

"Of course no principle is better settled at common law than the doctrine that one man cannot maintain a suit in the name of another without his consent. This is all that the court means to say, for they immediately add, 'and no person can be authorized to use the name of another without his assent given in fact or by legal intendment.' This last statement is inconsistent with the reporter's syllabus of the case, and implies that such consent may be given by legal intendment, which is exactly our case.

"I think it matter of grave doubt whether any Legislature could authorize a suit in your name or mine to be brought against our consent by a third person upon any common-law contract in which we had no interest, or in which we had an interest. The Chief Justice doubtless had in mind in part official bonds, upon which the Legislature could give authority to sue by express or direct words, or by legal intendment as well, for the benefit of any person intended by the Legislature to be protected by it. This case can be best understood by reading the next previous case, Brent *et al. v.* Davis, 10 Wheat. 396, and the special verdict of the jury. The two cases must be considered together and the reasoning of the Court must be understood to apply to the facts as they appear in both cases. And it is perfectly clear that the bond in suit in the second case was simply an obligation between private parties, and while McCue *et al.*, for whose use the second suit was brought, had an interest in having the lottery correctly drawn, they had no sort of legal interest in the condition of the bond. They were not named in it, and it was manifestly not made to protect them in any way or manner. It was wholly for the benefit of the obligees specifically named in the bond. Scores of other people, purchasers of the same lottery tickets, had the same interest in the same general subject-matter, yet not having taken any bonds for themselves specifically they would have no sort of legal interest in the condition of a bond taken by others similarly situated. Now the reasoning of the court must be applied to all these facts, and it is sound common law everywhere that upon such a bond a third person could maintain no suit, either in his own name or in the name of the obligees without their consent. This is the gist of the decision. The Chief Justice did not mean to say, and did not say, what the reporter's syllabus states. 'No person,' he says, 'who is not the proprietor (the obligees) of an obligation can have a legal right to put it in suit (in his own name, he means) unless such right be given by the Legislature'; which is unquestionably sound law as applied to contracts arising after such legislation was enacted, and perhaps to all contracts, as it simply gives a new remedy in favor of an assignee or other party actually interested

in the contract itself, while by the common law no suit could ever be maintained except in the name of the obligee.

"Then the Chief Justice adds, 'and no person can be authorized to use the name of another without his assent given in fact or by legal intendment.'

"This is exactly equivalent to saying that if he has such consent in fact or by legal intendment, he may maintain such suit in the name of another.

"Even at common law an assignee may always maintain a suit in the name of the assignor, but not in his own name without an act of the Legislature. An assignment of a chose in action always carries with it, by legal intendment, the consent of the assignor to a suit in his name to enforce it for the benefit of the assignee. And while anciently courts of law refused to notice such assignment, now assignments are everywhere protected by courts of law, and no act or even declaration by the assignor after the execution of the assignment is allowed to prejudice or affect the rights of the assignee.

"In this case of Washington Corporation *v.* Young, which we are considering, if the bond in suit has been assigned by the obligees (the corporation of Washington) to McCue *et al.*, the court would have held the action properly brought in the name of the corporation.

"The reporter's marginal note is not therefore supported by the opinion, but is calculated to mislead.

"The Chief Justice meant to say and did say in substance and effect, that upon a bond between private individuals, a suit in the name of the assignee or party in interest could not be maintained without an act of the Legislature—that the common law would not allow such suit, and that a third person could not bring suit upon such bond in the name of the original obligees, without their consent in fact or in law.

"No other construction or meaning can be legitimately given to this opinion. 'Can have a legal right to put it in suit' means to put it in suit in his own name; nor can he put it in suit in the name of the obligee without such obligee's consent in fact or law.

"Thus understood, it is an authority in our favor. It certainly was the intention of Congress in providing for and requiring a bond of the clerk, that such bond should be a protection to all suitors in the courts of the United States, and secure to them all moneys deposited with such clerk in the regular course of all proceedings in court.

"And the various decisions already referred to show that every court, State and national, so understand it. By legal intendment, therefore, and from the language of the condition, and from the purposes and objects intended by Congress to provide for, and to protect, the statute itself implies that a suit may always be brought by the party injured by the embezzlement of the clerk; and in the absence of an express provision allowing suit in his own name, by legal intendment the statute confers the right to bring suit in the name of the obligees, the United States, as trustees for the party injured, and implies the consent of such obligees to the bringing of such suit.

"In the language of the court in Babbitt's case, 95 U. S. 336, 'what is implied in a statute, will, deed or contract, is as much a part of it as what is expressed.'

"It would be an extraordinary anomaly for Congress to provide a bond for the protection of the suitors in its courts against the embezzlement of their moneys by the clerks of such courts, and at the same time give such suitors no remedy to recover such moneys. The remedy is the life of the contract (Edwards *v.* Kearzey, 96 U. S. 600). I do not for a moment believe that the Supreme Court of the United States would sustain such a doctrine. It would leave the parties—both parties—in every suit in the courts of the United States from Maine to California, without protection from the embezzlements of the clerks of such courts.

"The creditor in a judgment for a hundred dollars paid to the clerk of the court in which such judgment was secured and the bond-holders of a railroad corporation for whose benefit a million of dollars has been paid to the clerk under a foreclosure proceeding are alike without remedy.

"A statutory bond has the effect which in reason must have been intended by the statute.

Chladek *v.* Brown, 56 Ill. App. 379."

We call particular attention to the case of Stephenson *v.* Monmouth Min. and Mfg. Co. (1897) 86 Fed. Rep. 114, opinion by Lurton, circuit judge; Taft, circuit judge, and Clark, district judge, concurring. In the Stephenson case a statute of Michigan made it the duty of a city, when contracting for public improvements, to take a bond conditioned that all labor performed or materials furnished in the doing of the work be paid. The obligee in such bond was to be "the people of the State of Michigan." (84 Fed. 115.) A board of aldermen took a bond in which the obligee named was "the City of Menominee" instead of the statutory obligee. The principal contractor was Larson. The Monmouth Company furnished Larson a considerable amount of material which was not paid for, and thereupon the Monmouth Company sued the aldermen, Stephenson *et al.* The ground of the action was negligence in that the aldermen had not taken the bond required by the statute. On the circuit it was ruled that the bond actually executed by Larson to the "City of Menominee" did not give the Monmouth Company a cause of action. (84 Fed. Rep. 118.) But ruled Judge Lurton:

"Here, in our judgment, was the error of the learned judge. It is true that no action by the defendant in error as plaintiff would lie upon this bond; but that would also be the case if the bond had run to the people of the State of Michigan. The difference resulting from the mistake in drawing the bond so as to run to a promisee not authorized by the statute is that if the bond had run to the statutory obligee, the statute itself granted authority for the starting of a suit in the name of the people of the State of Michigan for the use and benefit of anyone intended as a beneficiary; while there is no statutory authority by which defendant in error might have used the name of the substituted obligee as plaintiff for its use and benefit. That no one can use the name of another as plaintiff without his consent given in fact or by legal intendment is clear. Washington *v.* Young, 10 Wheat. 404. But when a public municipality charged with the duty of taking and holding the bond required by this statute takes a bond properly conditioned, but running to itself, it does by legal intendment consent to the use of its corporate name as plaintiff by any

one beneficially interested in the bond thus taken, when indemnified against costs. No express authority of law is needed to authorize the use of the name of the city as plaintiff under such circumstances. The cases of Kiersted *v.* State, 1 Gill & J. 231, and Ing. *v.* State, 8 Md. 287, though differing in facts, are in point as to the principle."

Plaintiffs in error cite Murfree on Official Bonds, Section 504. (Brief, p. 8.) The head-note to that section is: "Action on official bond cannot be maintained *for collateral grievance* in favor of third persons." State *v.* Nichol is cited by Murfree as "8 Heisk. 657." The error is repeated by counsel for plaintiffs in error. (Brief, p. 9.) The correct citation is 8 Lea (76 Tenn.) 657. The fact that counsel in their brief repeat the error made by Murfree with respect to the citation of the case raises the presumption that counsel did not read the case before citing it. In the Tennessee case (State *v.* Nichol (1881) 8 Lea, 657), plaintiffs, merchants in Nashville, tendered the principal in the bond sued on, a clerk of a county court, certain currency in payment of a license which the law required them to obtain. The clerk wrongfully refused to accept this money. As Murfree says: "In this case it will be observed that the gravamen of the charge against the clerk was that he had *overdone* his duty * * *; where, however, the breach of the bond assigned is a neglect of the duty prescribed by law, *a very different question is presented.*" (Section 504.)

But in Section 430, Murfree says: "The chief distinction, therefore, between a statutory (official) bond, strictly so called, and a common-law bond is that the obligee or beneficiary of the former is entitled to all the special remedies and processes which are granted by statute law, whereas the common-law or voluntary bond stands upon the footing of an ordinary contract embodied in a bond upon condition between man and man."

And Section 468 discusses the question: "To whom officers and their sureties on their official bonds are liable," and states the answer to be: "In general a public officer is liable only to the person to whom the particular duty is owing"; and again in Section 486 he says: "The law in requiring an official bond contemplates it as security for those

whose rights it commits in certain cases to the officer." In Sec. 475, Murfree says: "It is almost unnecesary to say that whenever a breach of an official bond is committed by its principal obligor, a cause of action accrues to the obligee, either on his own behalf or for the use of such other persons as the instrument is intended to protect."

Murfree, Section 3: "At common law it (a bond) was not so far assignable that the assignee could sue upon it in his own name, nor, indeed, in the name of the obligee, unless authority to do so had been conferred in the assignment; and it has been said that its transfer in old times vested in the assignee only a power over the parchment or paper and the wax, to burn the one and melt the other. This rule, however, was so far relaxed that *suits in the name of the obligee for the use of his assignee became common before they were authorized by any statute.*"

Murfree, Section 64: "If a person holding such an official or trust position as might have caused him to be required to give an official bond to secure the due performance of his duty or trust, shall of his own accord and voluntarily enter into a bond with securities, conditioned for a due discharge of his duties or trusts, such a bond is not an official bond, because it was not required by the terms of any statute, or, if so required, was not exacted by any court having jurisdiction of the matter; but it is nevertheless a valid common-law bond, because it is founded on a sufficient consideration, is not prohibited by statute, nor contrary to public policy."

Murfree, Section 86: "A material distinction between an official bond, properly so called, and a common-law or voluntary bond, is that the remedies specially provided by statute for the enforcement of the former cannot be used for the latter."

Murfree, Section 323: "It is usually provided in statutes authorizing official bonds to be required of State, county or municipal officers, that suits may be brought upon them in the name of the official obligee 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. *Whenever, however, this express provision is omitted by the statute itself, the deficiency is*

supplied by the construction given to such statute by the courts whenever a proper case for such a ruling is presented." (Citing with approval, State to use *v.* Norwood (1858) 12 Md. 177, 194.)

Murfree, Section 325: "The receipt of money by the clerk of a court of record, if it is in satisfaction of a judgment in his court, is an official act, even if such payment be made voluntarily, and, *a fortiori*, a payment made to such clerk by the sheriff, of money collected on execution, imposes an official obligation on the clerk and his sureties. They are liable on their bond for money received by their principal."

In view of the reliance placed upon the Tennessee case (State *v.* Nichol, *supra*) a citation of Governor *v.* Allen (1847) 8 Humph. (Tenn.) 176, is peculiarly apposite. It was there held bonds made payable to the governor of a State "which violate no public policy or private morality, but are appropriate to the execution of the laws, are valid and may be sued on in the name of the governor, for the benefit of those interested; though there be no statute expressly authorizing the execution of such bonds." This case is cited by Murfree, if not with approval, at least without dissent. (Section 438, note.)

It is stated by counsel for plaintiffs in error (Brief, p. 11) that the form of bond sued on "was originally prescribed by the Judiciary Act of September 24, 1789," and it is insisted "*at that time* the language thereof had a fixed and well-settled meaning." Two cases are cited, Crocker *v.* Fales, 13 Mass. 260, decided in 1816, and Auditor *v.* Dryden, 3 Leigh (Va.) 703, decided in 1832.

In Massachusetts, Judge Parker had said of an "extra-official" bond: "No objection is made to the validity of the bond. It is undoubtedly good at common law." Thomas *v.* White (1815) 12 Mass. *368, *370.

In the Virginia case, the conclusion was reached the official bond of a clerk was not required "with a view to secure accountability for the revenue collected, but secure the records from removal and destruction, *and to ensure the faithful discharge of ordinary official duties.*" (3 Leigh, 713.)

The Virginia case did not present the question in the case at bar. The auditor of public accounts invoked a statutory remedy—he made two motions for execution against the clerk and his surety. (3 Leigh, 704.)

No question of private interest or the right of an individual to sue on the bond was involved. The issue as stated by counsel, was the bond of the *clerk* "a security for the due collection of public taxes." President Tucker said: "By these acts it is ordained that every clerk shall enter into bond with condition for the due and faithful execution of his office and that he will not permit the records to be removed out of the county except in cases allowed by law. And it is contended that these words embrace every description of official duty; that they comprehend not only such official duties as then existed, but such as might from time to time be superadded, and that the collection and payment of taxes on law processes, etc., is as much an official duty as any other imposed upon the officer. These positions can not be denied as general propositions." The Court, however, after an investigation of the course of legislation, reached the conclusion that the bond of the clerk did not cover taxes collected, because as to taxes a separate bond had been required. (3 Leigh, 713.)

It is evident from Rev. Stat. United States, Sec. 3946, that a mail-contractor's bond is intended *solely* for the benefit of the Government, because the guarantors are to be certified as "pecuniarily responsible for and able to pay all damages the United States shall suffer by reason" of the breach of the contract; so that the Texas case cited by plaintiffs in error (Brief, p. 11) is not in point here.

The bond of a collector of internal revenue is "conditional that said collector shall faithfully perform the duties of his office according to law." (Rev. Stat. United States, 1878, Sec. 3143.) So that when the collector illegally seized property, he was a trespasser and not acting in an official capacity. So that the Georgia case (Brief of Plaintiffs in Error, pp. 11, 12) can be readily distinguished from the case at bar.

The Blumb case (1889) (99 Mo. 357) cited by plaintiffs in error (Brief, p. 13) has no application to the case at bar.

In the Blumb case, Judge Black said: "The bond must be construed as a whole." (99 Mo. 361.) The bond used this language: "*and shall indemnify the City of Kansas.*" (See Devers *v.* Howard (1898) 144 Mo. 671, 678.) The bond sued on in the case at bar is not limited in its terms to merely an indemnity for the United States. Its provisions are comprehensive, "shall faithfully perform *all the duties* of said office of clerk" (Rec., p. 7.)

The opinion of Chief Justice Marshall (McCue *v.* Young (1825) 10 Wheat. 406) has already been exhaustively considered by both of the lower courts in their opinions (Rec., pp. 24, 25, 40); by Judge Lurton in the Stephenson case (1897) 84 Fed. Rep. 114, 118, 119, and in this brief, *ante*, pp. 24, 30-33.

Counsel again cite Murfree, Section 504 (Brief, p. 15), wholly omitting any reference to Section 323, where it is said: "When, however, this express provision is omitted in the statute itself, the deficiency is supplied by the construction given to such statutes by the courts."

Plaintiffs in error are still in error when they say: "What if this rule of construction as an original proposition be wrong. It is now an established rule of construction, and every *statute enacted in the light of it ought to be read in said light.*" (Brief, p. 16.) We assume this refers to the contention made on page eleven of the brief of plaintiffs in error, a statute enacted in 1789, adopts a judicial construction announced in 1816.

Counsel for plaintiffs in error also ask: "If there should be both a public and private loss, if the penalty of the bond should be insufficient to cover both, which is to have priority? Or if they are to be prorated, on what basis is it to be done? The statute should regulate this matter." (Brief, p. 16.) This query is not at all pertinent in the case at bar. The clerk died in 1892. (Rec., p. 7.) So far as the record discloses, the Government has made no claim, nor has any private party. If counsel desire light on a question of interest to them, we commend to their perusal the discriminating opinion of Judge Putnam in American Surety Company *v.* Lawrenceville Cement Co. (1899) 96 Fed. Rep. 25. In that case, a surety on a bond was threatened with a

suit by the United States, and also by numerous individuals. No judgment had been rendered on the bond, but the aggregate of the amount claimed exceeded the penalty of the bond. The statute did not provide for a priority of the United States, and this was spoken of as a "serious defect." (96 Fed. 26.) The penalty, however, was prorated among the United States and the individuals affected thereby.

The further question is propounded: "Shall the vigilant have a priority? (Brief, p. 17.) This is answered by Murfree in the affirmative. (Section 485.) Should a clerk commit a breach of his bond, he may be removed so that "the future losses, private or public," so much dreaded by plaintiffs in error (Brief, p. 16), will not materialize. Again, it is contended "if the bond is to cover private injuries, some period of limitation ought to be prescribed therefor." (Brief, p. 17.) We assume in the absence of a special statute that the general law of the forum would obtain.

It is next claimed that Judge Adams differentiated a bond of a clerk of the circuit court from a bond of a clerk of the district court. Counsel say the circuit court's opinion is based upon a supposed or fancied difference between the bonds of circuit and district clerks. (Brief, p. 18.) No such distinction is found in the opinion of Judge Adams. All he said was that "the money involved in litigation in such (circuit) courts belongs almost exclusively to individual suitors, and rarely ever to the United States." (Rec., p. 24.) He then adds that suits by the United States are usually brought in the district court. He did not rule that an action might be maintained on the bond of a circuit clerk, and that none could be had on the bond of a district clerk.

Indeed, *In re* Finks (1889) 41 Fed. 383 involves the liability of the sureties of a clerk of a district court and in The Avery (1814) Fed. Cas. 671, Mr. Justice Story said the "security of suitors" required money realized in admiralty be paid to a clerk of *the district court*.

It is asserted that "United States marshals give bond as security for the benefit of individuals and for breach thereof any person injured may sue and recover in his own name; whereas for a clerk's bond there are no such provis-

ions." (Brief of Plaintiffs in Error, p. 22.) This has already been considered. (*Ante*, p. 19.)

In Lammon *v.* Feusier (1884) 111 U. S. 17, it was shown that there was a conflict in the decided cases where a marshal seized the property of one by virtue of an execution issued against another, some holding that such was an official act, for which his bond was liable, and some holding he was acting as a trespasser, and was only liable individually. To remedy this may have been the object of the statute giving a cause of action on the bond.

It is stated: "No limitation exists on a clerk's bond. This manifestly because no one but the Government has a right of action thereon." (Brief, p. 22.) But every cause of action resulting by legal intendment is, in the absence of a special statute of limitations, controlled by the general statute of the forum.

Counsel for plaintiffs in error say that "by Section 995 all money paid into court was required to be deposited in the depository." (Brief, p. 23.) This is a duty enjoined on the clerk. (Section 5504.) It is further stated: "These provisions suggest that the rights of the individual suitor were so carefully guarded that Congress saw no reason why a right of action on the bond should be given to individuals. If parties to causes did their duty in seeing that these provisions were complied with, or if the court did its duty, there could be no individual loss." (Brief, p. 23.) Let us assume for a moment a court to be in session. The judge is at his accustomed place and the clerk is ready to do his bidding. A defendant appears by counsel and states to the judge: "I owe plaintiff $2,525, and no more." The defendant desires to make a tender, not in accordance with a Missouri statute merely regulating costs, but in accordance with general principles of law. The Court orders it paid to the clerk. As Judge Adams said (Rec., 27): "It is common practice, when the Court is about to take money into judicial custody, to order it paid to the clerk. His duty then arises under Section 995, above quoted, to deposit it forthwith in the registry (or depository) of the court. If he fails to do so, he violates his duty, and this is exactly what Clerk Watson did." It was not the duty of the court to go with the

clerk and see that the money was actually deposited in the depository. The clerk's bond guaranteed that.

Again, counsel say that if Stewart had "been careful enough of his rights to see to it that these wise provisions of the law were complied with," no loss would have ensued. (Brief, p. 24.)

It is found as a fact (Rec., pp. 19, 20) and conceded by the parties (Rec., p. 14): "When the $2,525.00 was so paid to said Warren Watson, he *on the same day* deposited the same in a bank to his own credit. * * * David D. Stewart had no knowledge of said acts of Warren Watson."

So that in the case at bar, sureties, who stood bound for the faithful performance of the duties of a principal and who as to such duties stand in his shoes, seek to escape an admitted breach of duty because plaintiff, "who had no knowledge of said acts," did not take some steps to relieve them.

The following authorities are also in point:

The law of California required the deputy in the office of the county treasurer to give a bond to the *State*, but in this case the bond was made payable to the *treasurer*. Held, to be an official bond, and that any person interested might sue thereon.

Hubert *v.* Mendheim (1883) 64 Cal. 213.

In the case of McMechen *v.* Mayor, the Court was of the opinion that where a bond is given by an auctioneer to the mayor of a city conditioned for a faithful performance of his duties, a suit will lie thereon in the name of the obligee to the use of the injured party, and if the privilege was refused by the obligee, a court of chancery would compel it by injunction.

McMechen *v.* Mayor (1806) 2 Har. and J. (Md.) 41.

The same case appears in 3 Har. and J. 534 (1815), where the injured parties appear as equitable plaintiffs, and they were allowed to recover notwithstanding that neither the bond nor the ordinance under which it was given provided for suits by others than the obligee.

Suits against clerks may be brought in the name of the obligee for the use of the injured party.

Brown *v.* Lester (1850) 13 Smedes and M. (Miss.) 392.

The bond sued on in the case at bar was executed in Missouri. (Rec., p. 12.) The liability of one who makes a promise to another for the benefit of a third party is a question of local law.

Union Mutual Life Ins. Co. *v.* Hanford (1892) 143 U. S. 187, 190.

In the case of Devers *v.* Howard (1898) 144 Mo. 671, a city took a bond conditional that a contractor would pay for all material used in the construction of a public improvement. The bond was not given in pursuance of any statute, nor was there any statutory law governing its interpretation or giving any cause of action thereon to a third party. But the court upheld the right of a third party to sue on the bond.

It is also stated: "The original marshal's bond is filed with the clerk so that individual suitors who have an interest therein may have access thereto and have at hand the actual signatures of the sureties, if execution be denied, whereas the original bond of the clerk is filed with the Department of Justice. The only conceivable reason for the distinction is that the United States alone is interested in the clerk's bond." (Brief of Plaintiffs in Error, p. 22.) The reason for this distinction is that if the bond of the clerk was filed with the clerk, he would be the custodian of his own bond.

IV.

The contention that Watson did not receive the money by virtue of his office is conclusively answered by the opinions in the case at bar. (Rec., pp. 25-28, 37-39.)

It is claimed that "the statutes of Missouri on the subject of tender have no application in the Federal courts." (Brief, p. 24.)

Before considering the merits of this defence, a word as to its pertinency is in order.

The plaintiffs in error are the sureties of a clerk. They bind themselves that the clerk "shall faithfully perform all the duties of the said office of clerk." (Rec., p. 7.) A court is in session. A defendant, in the presence of the judge, pays $2,525 to a clerk. An order to that effect is made *of record* and signed by the judge. (Rec., p. 27.) The clerk embezzles the money. His sureties for a defence say the court of which their principal was an officer acted without warrant of law in receiving the money. Such a defence is untenable: the clerk and his sureties are estopped to deny the legality of the payment of money to him.

State *ex rel. v.* Ewing (1893) 116 Mo. 129, 135.

The sureties of the clerk attempt to support this defence by an extensive dissertation on what statutes of a State are followed by a Federal court. (Brief, pp. 24-28.) When did the clerk become the law officer of the court? The New Jersey case cited by plaintiffs in error (Brief, p. 40) expressly decides: "The clerk of the Circuit Court does not possess the least shred of judicial power." He cannot decide "what sum shall be paid, or what shall be received as money, or where the money shall be placed for safe keeping, or to whom it shall be paid."

And yet the sureties on the bond of a clerk gravely argue that the clerk had the right to decide for himself that a Missouri statute did not apply to a Federal court, and hence that "for safe keeping" he would convert the money to his own use.

All that was ruled in the case of Times Pub. Co. *v.* Carlisle (1899) 94 Fed Rep. 762, 771, was that "the Federal courts are not required to follow subordinate provisions of State statutes *which would encumber the administration of the law or tend to defeat the ends of justice in their tribunals.*"

It is said that Section 2939, Rev. Stat. of Missouri, 1889 (Brief of Plaintiffs in Error, p. 26), is merely a regulation of costs, but it is admitted: "It undoubtedly does authorize the depositing of the amount of the tender in any case *with the clerk*, and thus by implication makes it an official duty of the clerk to receive and care for the deposit"; but this is regarded *as a mere incident*. A litigant who has lost three

thousand dollars by reason *of a mere incident* may be pardoned if he differs with counsel as to the *incidental* feature of such a contention.

Again, counsel for plaintiffs in error claim: "It goes without saying that the State of Missouri cannot prescribe the duties or regulate the offices of the clerks of the courts of the United States." (Brief, p. 27.) Why not? Section 914 of the Revised Statutes of the United States conforms the practice in actions at law in the Federal courts, as near as may be, to those existing in like causes in the State courts. Assume that an attachment action was instituted in a Federal court in Missouri. The clerk fails to take the bond required by the Missouri statute. Would there be no liability on his bond?

But, independent of the Missouri statute, the principles of the common law permit a defendant to deposit for the use of a plaintiff, money admitted to be due. "*The rule is universal*" (Brief of Plaintiffs in Error, p. 36), but for some occult reason it is claimed this rule does not apply to Federal courts. (Brief, p. 48.)

We are frank to confess our inability to fully comprehend the contention of plaintiffs in error. A statute of Missouri permits a defendant to pay money to a clerk. (Brief, p. 26.) The Missouri courts hold a payment to a clerk to be a payment into court. In Mahan *v.* Waters (1875) 60 Mo. 167, 171, Judge Hough, speaking of a tender, said the defendant "must bring the money into court; that is, he must deposit it with the clerk."

In Crawford *v.* Armstrong (1894) 58 Mo. App. 214, money "deposited with the clerk of the circuit court" (217) was spoken of as "money paid *into court*," and "in the custody of the law." (Rombauer, P. J.)

We next learn that the statutes of a State in the Federal court "speak only when the other statutes of the United States are silent." (Brief, p. 28.) We next learn "there is no Federal statute directly bearing upon the subject." (Brief, p. 49.)

To recapitulate:

(*a*) A State statute applies in a Federal court only

when the Federal statute is silent. (Brief of Plaintiffs in Error, p. 28.)

(*b*) The Federal statute is silent. (Brief, p. 48.)

(*c*) The State statute *does not apply*. (Brief, p. 24.)

This is indeed reasoning in a circle.

V.

We are next confronted with the ever favorite defence of sureties: their principal did not act by virtue of his office. In this connection we cite the case of National Bank of Redemption *v.* Rutledge (1897) 84 Fed. 400, Hammond, J. The rule is thus stated: Any act which, if done genuinely and honestly by an officer would be an official act, is, if done dishonestly and fraudulently, an act done by virtue of his office. The discussion is quite exhaustive.

Will any one contend that if Watson had safely kept the money, he would not have claimed the statutory commission?

It is next argued that the money paid by Henry County was not paid into court, because the court had no control over the same. "The money remained the county's money, and could have been withdrawn by it, of its own motion, without the leave or license of any one." (Brief, p. 31, 32.) We had not fully appreciated the force of this until we read further, that if Henry County paid the money into court for the use of the plaintiff, "it immediately became the property of the plaintiff." (Brief, p. 36.) Certainly Henry County, in view of its answer in the Stewart case (Rec., p. 13), "*now brings said sum into court*," could not claim it was not properly paid into court. Hence it could not withdraw the money.

But under Section 995 it was the duty of the clerk to place it in the depository, and there it could not be touched without an order of the court.

So that if, as contended by the sureties, the money which Henry County "now brings into court" was never subject to the order of the court, it was because their principal committed a breach of his official bond.

The agreed statement of facts shows that "there was

entered *on the records of the court*," a recital that the defendant deposited with the clerk $2,525. (Rec., p. 13.)

As Judge Adams well said (Rec., p. 30): "It is common knowledge that the record-book is the mouthpiece of the court; it is under the direct control of the court, and no entry is made without the sanction of the court. *In fact, it appeared affirmatively at the hearing of this case that the record proceedings of March 3, 1891, showing a deposit of the money in question with the clerk*, was signed by the judge of the court." Counsel for plaintiffs in error deny this statement of fact in the opinion of the trial judge. (Brief, p. 33.) Desperate indeed must be the cause which requires at the hand of its champion an assertion that the trial judge was guilty of an untruth.

The judgment should be affirmed.

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EDWIN A. KRAUTHOFF,
For David D. Stewart, Defendant in Error.

DAVID D. STEWART,
Of Counsel.

No. 121.

Howard et al. (Pltfs. in Error) v. Stewart

Supreme Court of the United States.

for U. S. (by Leave)

OCTOBER TERM, 1901.

No. 121.

Filed Feb. 8, 1902.

FREDERICK HOWARD ET AL.,
Plaintiffs in Error,

vs.

UNITED STATES, TO THE USE
OF DAVID D. STEWART,
Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

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ALEXANDER NEW,
EDWIN A. KRAUTHOFF,
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ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

On January 20, 1902, this cause was argued orally, but unfortunately, Mr. Justice HARLAN and Mr. Justice GRAY were absent. Afterward on January 27, 1902, the cause was restored to the docket for re-submission to the full bench, with leave to counsel to file additional brief in ten days, if so desired.

The original briefs covered the ground of the action thoroughly and the oral argument by counsel was thought to be exhaustive of the subject, but further reflection has induced a be-

lief that perhaps counsel can be of some further service to the Court.

As to the question of jurisdiction, we desire to repeat that we are not apprehensive of the decision of the Court on the merits. We appreciate however that the question of jurisdiction is one that cannot be waived by counsel, but one that the Court is bound to notice for itself.

In addition to the cases cited in the original brief of defendant in error, we call the attention of the Court to State of Arkansas vs. Kansas & Texas Coal Company (December 2, 1901) 22 Sup. Ct. Rep. 47. In that case the State of Arkansas brought a suit in a state court to enjoin a defendant from bringing into the state certain laborers. The defendant, a foreign corporation, removed the case to the Federal Court where an injunction was denied and an appeal taken to the Supreme Court of the United States. It was admitted that a Federal Court could not take cognizance of the case on the ground of diverse citizenship because the State of Arkansas was not a citizen. It was contended that the suit was one arising under the laws of the United States, but, said the Court, speaking through Mr. Chief Justice FULLER: "In this case, the State asserted no right under the constitution or laws of the United States and put forward no ground of relief derived from either." In that case, the defendant asserted that under the inter-state commerce clause of the Constitution, the complainant had no right to interfere with the acts of the defendant, but, said the Court "assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the Fourteenth Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the constitution or laws of the United States."

In the case at bar, the right of Stewart to maintain the action was sustained on common law principles, that is, the clerk having given a bond to the United States conditioned faithfully to discharge the duties of his office, such bond inured to the benefit of every person affected by a non-performance of such condition, and it was held the United States, *in taking such a bond*, by legal intendment consented to the use of its name, and gave the

right to sue on the bond to any one suffering damage by reason of a breach of the conditions of the bond.

The sureties on the bond defended on the ground that because there is no statute of the United States under which a cause of action can arise in favor of Stewart, there is no right to recover. As shown in the original brief, the Supreme Court of the United States has no jurisdiction to entertain the writ of error sued out in the pending action unless the cause of Stewart is one arising under the statutes of the United States. Having invoked the jurisdiction of this Court on the ground that the cause is one arising under the laws of the United States, the sureties are in no position to contend that under the laws of the United States no cause can ever arise in favor of Stewart. As Mr. Chief Justice FULLER said in the case above cited, such a contention only demonstrates that "the action could not be maintained at all, and not that the cause of action arose under the constitution or laws of the United States."

II.

Some confusion has been injected into the case as to the precise Acts of Congress which bear on the question before the Court.

By section 7, chap. 20 of the Act of Congress approved September 24, 1789 (1 U. S. Stat. at Large, p. 76) it was provided: "And the said clerks (of courts of the United States) shall also severally give bond, with sufficient sureties, (to be approved of by the Supreme and district courts respectively) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

By section 2, chap. 93, of an Act of Congress approved March 3, 1863 (12 U. S. Stat. at Large, p. 768) it is provided: "The clerk of every court shall give bond in such sum as may be fixed by the court, and a new bond may be required whenever the court shall deem it proper that such bond shall be given."

By Volume One of the Revised Statutes of the United States, Section 795, it is provided: "The clerk of every court shall

give bond in a sum to be fixed, and with sureties to be approved by the court, which binds him faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

Judge ADAMS, in the opinion rendered in this case in the circuit court, referred to section 795 (Rec. p. 23) and counsel for plaintiffs in error, in their brief, refer to "the form of bond required by Section 795" (Brief, page 11).

As appears from the preface to the Revised Statutes of the United States, it was provided that the same "shall not preclude reference to nor control in case of any discrepancy or effect of any original act as passed by Congress since the first day of September, 1873."

As Judge CALDWELL points out in his opinion (Rec., p. 35) "By the later act of February 22, 1875, 18 U. S. Stat. Chap. 95, Sec. 3, page 333," it is provided:

"That the clerks of the * * * circuit and district courts, respectively, shall each before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court for which he is appointed, to the United States, in the sum of not less than five and not more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk."

It is now contended that because the act of February 22, 1875, names the United States as the obligee, the bond inures only to the benefit of the named obligee, and no one else can maintain an action thereon. As before stated, the act of March 3, 1863, did not give the name of any obligee, and so remained the law until February 22, 1875, nearly thirteen years, so that if the contention of counsel for plaintiffs in error is sound, that is, because the United States is named as the sole obligee in the bond, no cause of action arose on the bond in favor of any one else, it is evident that from March 3rd, 1863, to February 22nd, 1875, no cause of action could arise in favor of anyone, not even the United States, on the bond of the clerk of a court of the United States.

But, as shown by Judge CALDWELL in his opinion in the case at bar (Rec., p. 35): "Very curiously, section 795 of the

Revised Statutes (as did also the act of March 3rd, 1863), omitted to name any obligee in the bond. This omission, however, in no manner affected the validity of the bond, for, with or without a named obligee, the bond was a valid security to any one injured by a breach of its conditions."

At the oral argument of the case Mr. Justice WHITE asked the question, if a private suitor exhausted the penalty of the bond, what became of the rights of the Government? At first blush, it seems clear that on general principles, the United States should be entitled to a priority but, as we shall endeavor to show, no such rule of law prevails in this case. The United States as a government and each individual citizen as an integral unit in that system of government, stand on an equal footing so far as their rights are concerned.

It will be recalled that counsel for plaintiffs in error placed considerable stress upon Crocker v. Fales, 13 Mass., 262. This is spoken of as a *contemporaneous construction* of an Act of Congress approved in 1789, although the case was not decided until 1816, and it is claimed that by adopting the act of 1789, Congress also adopted the construction announced by the Supreme Court of Massachusetts in 1816, twenty-seven years later (Brief of Plaintiffs in Error, page 11.)

It is also stated "What if this rule of construction as an original proposition be wrong? It is now an established rule of construction, and every statute enacted in the light of it ought to be read in such light." (Brief of Plaintiffs in Error, page 16.)

As shown in the original brief of defendant in error (page 37) Crocker vs. Fales was decided in 1816, and hence Congress in passing the Act in 1789, could not have crystalized into law an interpretation given by the Supreme Court of Massachusetts twenty-seven years later.

Counsel for plaintiffs in error state: "It is therefore to be fairly assumed that Congress did not intend to give any greater effect to the language, but intended to use it in the sense *then understood by those learned in the law*. It is a rule of construction that where words have a well understood legal meaning, it is to be presumed that the legislature used them in that sense when subsequently adopting a statute." (Brief for Plaintiffs in Error, page 11.)

It is also stated that where there is an established rule of construction "every statute enacted in the light of it should be read in such light, because, if the legislative body wants the law to be otherwise than it would be when thus read, all it would have to do would be to say so in one or two words, and when it says nothing, it must be presumed to intend the consequences of its silence." (Brief for Plaintiffs in Error, page 16.)

As early as 1814, Mr. Justice STORY, who certainly is entitled to be classed as one of those "learned in the law," and also as being advised of the general rule of construction of statutes prevailing, especially in the State of Massachusetts, with whose jurisprudence he was particularly familiar, stated in The Avery, Fed. Cas. No. 671: "As to the claim *of the clerk* to one and a quarter per cent. commission, allowed him by the Act of February, 1799, c. 125, reviving the Act of 1st of March, 1793, c. 20, (1 Stat. 622) 'on all money deposited *in court*,' there is not, in my judgment, the slightest reason to contest it. The only argument urged against it is, that the money under the interlocutory sale ought not to have been paid *into court* by the marshal; and that *the clerk* cannot gain a title by an irregular act of the marshal. The whole foundation of this argument fails. It was not only not an irregularity for the marshal to pay the money into court, but it would have been a gross misconduct on his part to have done otherwise. It is his duty, on all interlocutory sales, to bring the proceeds immediately into court with a regular account of such sales. This is the known and uniform practice of the court, and I will add, it is a practice not only founded in the settled doctrines of the admiralty, *but also of great importance for the security of suitors.*"

So that as early as the year 1814, we have a distinct recognition by one so learned in the law as Mr. Justice STORY, that the *security of suitors* required a marshal, who, it is conceded, is a bonded officer, to pay the money to the clerk of the court. It can not be contended there was a distinction made between paying the money *into court* and paying the money *to the clerk* in the case of The Avery, for Mr. Justice STORY is particular to state that the property was sold "and the proceeds paid over to the *clerk of the district court.*"

In the opinion delivered in this case on the circuit, Judge

ADAMS said: "It is well known from the character of the jurisdiction conferred upon circuit courts, as well as from the practical administration and exercise of such jurisdiction, that the money involved in litigation in such courts, belongs almost exclusively to individual suitors and rarely ever to the United States" (Record, page 24).

It is stated by Judge CALDWELL: "For more than a century, the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such. Under the provision of Section 828, the clerk is allowed for 'receiving, keeping and paying out money in pursuance of any Statute or the order of the Court one per centum on the amount so received and kept,' and this poundage has always been allowed to them on moneys received and paid out by them. *Nothing short of legislative action can change the law as established by more than a hundred years of uniform and constant practice of the courts.*"

The case of State to use of Mayor vs. Norwood, 12 Md., 177, was decided in 1858. In that case it was contended by counsel for defendants "The Mayor and City Council of Baltimore had no right to use the name of the State in entering a suit upon this bond without authority from the State." 12 Md., 178. The Court said: "The laws which provide for the execution similar to the one before us do not require them for the purpose of protecting the rights of the State alone. They are also designed to secure the faithful performance of official duties in the discharge of which individuals and corporations have a deep interest, and, therefore, they should have the privilege of suing such bonds for injuries sustained by them through the negligence or mal-conduct of officers." 12 Md., 194.

In the original brief of defendant in error, pages 18-20, cases decided by Mr. Justice BROWN, Judge DILLON, Judge SIMONTON, Judge LURTON, Judge SEYMOUR, and Judge DICK were cited, all showing a common understanding that the clerk in receiving money incurs responsibility, and the money paid to a

clerk is covered by his official bond. It is now claimed that the clerk incurs no responsibility save merely a personal obligation, and that his official bond did not protect the money.

From all these cases it is clear that Congress intended by the Act requiring the bond to be given that such bond should stand as security for private suitors affected by the breach of the conditions of the bond and that by legal intendment the right was given to sue on the bond.

When this statement was made at the oral argument, Mr. Justice WHITE interrupted counsel with the statement that such a contention clearly invoked the jurisdiction of the court on the ground that the cause arose under the laws of the United States. This is not so. The contention of Stewart is that without any Act of Congress requiring the bond to be given, and on principles of general jurisprudence as distinguished from congressional legislation, if the clerk of a court of the United States voluntarily gave a bond conditioned and in the form as the one sued on in the case at bar, a private suitor would have a cause of action, and this too without any express statute requiring the bond to be given, or giving a cause of action. A circuit court of the United States would have jurisdiction of such an action in a case involving over two thousand dollars, and instituted by a non-resident of the State in which the suit was brought.

The contention of the plaintiffs in error is that, as Congress required the bond to be given "to the United States," but did not give a cause of action to a private suitor, Congress negatived the general principles of jurisprudence contended for by us, and the cause of action which otherwise would exist did not in fact exist.

We are not sure that we have made ourselves entirely clear, but what Stewart contends for is this:

(a.) If the clerk of a circuit court of the United States voluntarily gave a bond conditioned for the faithful performance of his duties, the validity of such bond is not affected by the absence of a statute requiring it to be given. The cases cited in our original brief show that it needs no statute to enable an officer to give a bond conditioned for the faithful discharge of his duties. Of course if there was a statute enlarging or varying the effect of

the bond, or giving a special remedy on the bond not otherwise existent, such statute would be enforced by the court.

(*b.*) Such a bond voluntarily given, either with or without a named obligee, becomes in effect a common law obligation, on which any person who is directly interested in the faithful discharge of the duties of the office has a right to maintain an action.

(*c.*) Jurisdiction of such a case can be entertained by a circuit court of the United States in any case involving the requisite amount and diversity of citizenship.

In this aspect of the case, our right to recover can not be said to present a case arising under the laws of the United States. On the contrary, it is the defendant sureties who invoke the laws of the United States and who contend that because the statute names a given obligee, the bond inures only to the benefit of the obligee. As said by Mr. Chief Justice FULLER in the State of Arkansas vs. Kansas & Texas Coal Company, *supra*, such a contention "would only demonstrate that the action could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States."

III.

At the oral argument of the case, counsel for defendant in error, in response to an inquiry of Mr. Justice WHITE as to the priority of the Government, referred to the rights of the United States "by reason of its sovereignty." In this statement counsel inadvertently confused the rights of sovereignty of the crown of England and the rights of sovereignty of the people of the United States. In the United States it is the people who are the sovereign, and the Government, as a nation, has only those rights which the people, either by the Constitution, or by legislative enactment, have conferred upon the Government, so that it is improper to say that "by reason of its sovereignty" the United States is entitled to priority in any case. It is only by reason of positive law that such priority exists in any case. As stated by Mr. Justice STORY, speaking for the court: "The right of priority of payment of debts due to the Government is a prerogative of the crown well known to the common law. * * * The claim of the United States, however, does not stand upon

any *sovereign prerogative*, but is exclusively founded upon the actual provisions of their own statutes."

United States vs. State Bank of North Carolina, 6 Peters, 29, 35.

That the priority of the United States as a creditor depends upon the provisions of a statute enacted by Congress, and does not arise from any claim of sovereignty, is conclusively established by the decision of this court in Cook County National Bank vs. United States, 107 U. S., 445, in which it was held that the United States had no priority of payment of debts due to it in the administration of the affairs of an insolvent National Bank. It is not expressly stated in that case that a statute was necessary, but the reasoning of the court shows there was no statute giving such a priority, and, hence, the priority was not allowed.

In Murfree on Official Bonds, Section 279, it is stated: "Closely connected with the subject of official bonds given to the United States, or for its benefit, is the priority of payment to which the government is entitled *under the several Acts of Congress.*" In the section cited *et seq.* the various decisions of the Supreme Court of the United States, construing statutes providing for the priority of payment are considered, and such statutes are held to apply only in certain cases arising from the insolvency of the debtor.

The penalty of the bond sued on in the case at bar is twenty thousand dollars; this is the maximum amount required by the Act of February 22, 1875. The record in the case discloses that the defalcation complained of occurred March 3, 1891, more than ten years ago. (Record, page 34.) It further states that the clerk who committed the wrongful act died March 24, 1892; that said clerk was a resident of Jackson County, Missouri, and his estate was administered by the Probate Court of said county, and a final settlement was made September 11, 1894. It is further stated that on April 5, 1892, the administrator of the estate of the deceased "gave the notices required by the statutes of Missouri for the presentation of claims" against the estate of the clerk. The record further shows: "At no time did the United States * * * ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by

the laws of Missouri for exhibiting or presenting claims against the estates of decedents." (Record, page 32.)

From this it is evident that on the bond in suit the United States has no cause of action because it has suffered no damage by reason of any of the acts of the clerk, so that, as stated by Mr. Justice WHITE on the oral argument, the question as to the priority of the United States on the bond in suit is more theoretical than practical. The only way in which the question of priority is injected in the case at all is on the theory that all of the penalty of the bond is required for the protection of the government, and, hence, under no circumstances can a private suitor have a cause of action; in other words, the sureties do not admit that this is a bond given for the benefit of the government and also for the benefit of a private suitor, in which the penalty is insufficient to cover the loss sustained by the United States and also by the private suitor, and ask the protection of the Court so that the priority of the United States may be secured, but the sureties contend that by reason of a possible claim of priority, no cause of action should be maintained in favor of a private suitor. But, as contended for by Stewart, the bond stands as security for both the government and the private suitor.

So that, whether the United States is entitled to priority in the event of it having suffered damage at the hands of the clerk, does not arise in this case. There is no middle ground. Either the bond inures to the benefit of Stewart, or it does not; if it inures solely to the benefit of the government, the question of the priority of course does not arise, but if, as shown by all of the authorities on the subject, the bond stands as security both for the government and for the individual, then no question of priority arises in this case, because there is no showing that the United States has suffered any damage nor sustained any loss, nor that the United States has a cause of action on the bond.

After all, the government of the United States is but an aggregation of individuals. The constitution which created and preserved the national union has for its preamble "the people of the United States." In the absence of an express enactment of Congress to that effect, the rights of the aggregate of the people of the United States are no more sacred than the individual right of any one of those people. As Bishop HOOKER said: "Of law,

it cannot be less than acknowledged than that her seat is the bosom of God, her voice the harmony of the universe, *the very least as feeling her care*, the greatest as not exempt from her power." And was it not our Great Master who said: "Inasmuch as you have done it unto the least of these, my brethren, you have done it unto me."

So that when this court, by its judgment of affirmance herein, preserves sacred and inviolable, the temples of justice in which are administered the laws governing us in our private and public relations, the rights of the United States as a government of the people of the United States are sacredly preserved. Such a result, announcing to the world, that money deposited with the clerk of a court of the United States, in the presence and with the sanction of the court, is a sacred trust, one to be preserved by the government and effectuated to the owner, is of infinitely more value than a declaration that in the distribution of the penalty of an official bond the government is entitled to priority and such priority held to exclude the right of an individual, an integral unit in that system of government.

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